TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DELTA AIR LINES, INC.,

Petitioner,

vs.

ROSEMARY AUGUST,

Respondent.

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS AMICUS CURIAE

INTEREST OF THE AMICUS

The National Association for the Advancement of Colored People (NAACP) is a non-profit membership association representing the interest of approximately 500,000 members in 1800 branches throughout the United States. Since 1909, the NAACP has sought through the courts, the legislative and the executive branches of

government to establish and protect the civil rights of minority citizens. In these efforts, the NAACP has often appeared before this Court as an amicus in cases involving voting rights, jury selection, capital punishment, school desegregation, employment discrimination and other cases involving individual rights protected by the Constitution of the United States, and in cases protecting the vitality of the Bill of Rights.

The case at bar is of particular interest to the NAACP. It involves the review of a judgment which, if reversed, will in all likelihood put Title VII plaintiffs in a financially precarious position if they should believe sufficiently in their case to pursue it to judgment. It would indirectly deny to the district courts of this country the discretion to implement the purposes of Title VII. The Congress has sought the assistance of private litigants to come into the federal courts to pursue their right to employment without discrimination on the basis of race, religion, sex or national origin recognizing that government resources alone cannot turn the tide of discrimination in employment.

The importance of this case is that reversal would place a club in the hand of employers which could bring financial ruin to plaintiffs who bring Title VII actions. It would be particularly unfortunate for those litigants who are without resources and for whom the district court has appointed counsel and allowed them to proceed without payment of fees, costs or security as provided by Title VII. Such was never intended by the Congress of the United States.

CONSENT OF THE PARTIES

With the consent of both parties pursuant to Rule 42 of the Supreme Court Rules, Amicus respectfully submits this brief in support of Respondent, Rosemary August. The consents are included in the Appendix to this Brief.

SUMMARY OF ARGUMENT

This Court does not have the power to abridge substantive rights in the guise of enacting Rules of Procedure. Acceptance of defendant's arguments would place this Court in such a posture. The Congress enacted substantive legislation to eradicate discrimination in employment, and encouraged the penurious complainant to seek redress by providing judicial discretion to appoint counsel, waive fees, and award attorneys fees and costs. The application of Rule 68 to Title VII cases would abridge that judicial discretion, place complainant's counsel on the horns of a dilemma, and frustrate the purposes of Title VII. Furthermore, even if Rule 68 applies, defendant's offer of judgment failed to meet the plaintiff's demand for relief, thus, it did not satisfy Rule 68.

ARGUMENT

I.

COURTS ARE WITHOUT THE POWER TO BURDEN SUBSTANTIVE RIGHTS GRANTED BY CONGRESS.

The Congress, in its wisdom, addressed the vast problems of discrimination in this country by enacting the 1964 Civil Rights Act. It provided for the elimination of discrimination in public accommodations and facilities, education, employment and in the use of federal funds in any area. In addressing the problems of discrimination in employment, it enacted "a complex legislative design directed at a (sic) historic evil of national proportions." *Albemarle Paper Company v. Moody*, 422 U.S. 405, 416, 95 S.Ct. 2362, 2371 (1975). The purpose of this design "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identified group of white employees over other employees". *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430, 91 S.Ct. 849, 853 (1971).

This Court recognized that the Congress knew that the federal government, alone, could not enforce the Civil Rights Law and observed in *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 401, 88 S.Ct. 964, 966 (1968):

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. . . .

In drafting Title VII, the Congress included two provisions to encourage private enforcement of the Act. Section 706(f)(1) provided:

> . . . the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. . . .

This provision was clearly directed to encourage the complainant of limited means to take his claim of discrimination to court in the event he was not satisfied by the outcome of his claim at the Equal Employment Opportunity Commission. It did not distinguish between the complainant whose charge was found to have merit by the Equal Employment Opportunity Commission and the complainant whose charge was found to be lacking in merit. The Congress rightfully recognized that there could be substantial differences of opinion between clerks in an administrative agency and the judges who have been appointed by the President and whose qualifications have been examined by the Senate of the United States. Experience has demonstrated that the penurious claimant whose claim is found to be without merit by the Equal Employment Opportunity Commission does prevail from time to time in the district court. That sort of complainant must be protected.

The Congress also provided in Section 706(k):

> In any action or proceeding under this title [42 U.S.C. § 2000e, *et seq.*] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

This section gave the district court the discretion to determine how costs should be borne by the parties.

The common law in the usual case made no provision for costs of litigation. In the United States, legislation has provided for distribution of the cost of litigation. Ex-

cept for very limited circumstances, attorneys fees have, generally, been the burden of each party to the litigation to the extent that each litigant incurs the services of lawyers. This Court examined this "American Rule" and after an extensive review of the English system and American legislation over the years, determined that the Rule still applies unless a legislature enacted legislation to provide for the award of costs. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612 (1975). The *Alyeska* case makes it crystal clear that there is no right to attorney fees and costs except that the right is established by statute.

The Congress has stated its policy in section 706(k) that in Title VII litigation, the district court has discretion to award costs to a prevailing party. Interestingly, Title VII does not require that a particular party is to have costs awarded. Apparently, the Congress was willing to rely on the courts to establish, by "Judicial Rule", a method of determining who was entitled to costs as a matter of sound judicial discretion. We suggest that this Court's examination of Title VII, particularly section 706(k), has set out reasonable guidelines for determining what is informed judicial discretion and when costs and fees should be imposed. In this connection we particularly invite the Court's attention to its decision in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 417-424, 98 S.Ct. 694, 698-701 (1978). It is clear, from the Court's examination of the legislative history of Title VII and the decision in that case, that the complainant who lost, was to be further "punished" only if his action was found to be unreasonable, frivolous, meritless or vexatious. While the *Christiansburg Garment* case addressed itself only to the question of attorneys fees for a prevailing defendant, we suggest that the principles announced by the courts

in that case is entirely consistent with the remedial nature of the Civil Rights Act of 1964. The *Christiansburg Garment* case was not an isolated case or an aberration. This Court in *Albemarle Paper Company v. Moody*, 422 U.S. 405, 415, 95 S.Ct. 2362, 2370 (1975), decided a little over a month after *Alyeska*, commented on section 706(k):

> The Court held there (*Newman v. Piggie Park Enterprises*, 390 U.S. 400, 88 S.Ct. 964), that attorneys fees should "ordinarily" be awarded—i.e., in all but "special circumstances"—to plaintiffs successful in obtaining injunctions against discrimination in public accommodations, under Title II of the Civil Rights Act of 1964. While the Act appears to leave Title II fee awards to the district court's discretion, 42 U.S.C. § 2000a-3(b), the court determined that the great public interest in having injunctive action brought could be vindicated only if successful plaintiffs, acting as "private attorneys general", were awarded attorneys fees in all but very unusual circumstances. There is, of course, an equally strong public interest in having injunctive actions brought under Title VII, to eradicate discriminatory employment practices. But this interest can be vindicated by applying the *Piggie Park* standard to the *attorneys' fees* provision of Title VII, 42 U.S.C. § 2000e-5(k), see *Northcross v. Memphis Board of Education*, 412 U.S. 427, 428, 93 S.Ct. 2201, 2202, 37 L.Ed.2d 48 (1973). . . .

The scheme devised by Congress to deal with the problem of discrimination in employment, has been approved by this Court in numerous cases. The court's discretion to appoint counsel and allow filings without fee, coupled with its discretion to award attorneys fees and costs to a prevailing party is an integral part of the rights afforded complainants who seek a remedy for discrimination in employment which violates Title VII of the Civil Rights Act of 1964 as amended. In considering

the arguments here raised in support of the Seventh Circuit Court of Appeals result, we respectfully suggest that this Court should be mindful of its decision in *Helvering v. Gowran*, 302 U.S. 238, 245, 58 S.Ct. 154, 158 (1937), in which the Court stated that:

> In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U.S. 208, 41 S.Ct. 451, 65 L.Ed. 892; *United States v. American Ry. Exp. Co.*, 265 U.S. 425, 44 S.Ct. 560, 68 L.Ed. 1087; *United States v. Holt State Bank*, 270 U.S. 49, 56, 46 S.Ct. 197, 199, 70 L.Ed. 465; *Langnes v. Green*, 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520; *Stelos Co. v. Hosiery Motor-Mend Corp.*, 295 U.S. 237, 239, 55 S.Ct. 746, 79 L.Ed. 1414; *cf. United States v. Williams*, 278 U.S. 225, 49 S.Ct. 97, 73 L.Ed. 314.

We recognize that there is nothing in the Civil Rights Act of 1964, as amended which would prohibit the application of the Federal Rules of Civil Procedure in their entirety to Title VII litigation. However, the purposes of the Act should not be ignored when the Court examines that question. It is clear that the application of Rule 68, Federal Rules of Civil Procedure, can frustrate the policies underlying the Act which were promoted by the Congress of the United States. Indeed, applying Rule 68 in Title VII cases places an unconscionable burden on lawyers who represent complainants of discrimination in employment. On the one hand, pursuant to Rule 11 of the Federal Rules of Civil Procedure, the attorney represents to the court that he believes the client's case has merit. It may well be that he is wrong. There is further imposed upon counsel for the complainant the burden of determining and advising the complainant whether he should go forward on his case when an offer

is made pursuant to Rule 68, knowing that if he is wrong, he may well destroy any chance of that complainant being able to support himself and his family even if he is gainfully employed. We can only assume that defendants act in good faith and only do those things which it believes to be necessary to prepare itself to defend a serious charge which has been brought against it. In the large enterprise such preparation may entail deposing numerous people who are all mentioned by the complainant as being persons who have knowledge of the conduct about which the complainant complains. In today's world, the minimum expense may be several thousands of dollars. This Court's observation in *Christiansburg Garment Co. v. E.E.O.C., supra*, 98 S.Ct. at 700 is apt when considering the lawyer's dilemma.

> In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. *This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. . . . The law may change or clarify in the midst of litigation.* (emphasis supplied)

We suggest that the whole of Title VII of the Civil Rights Act of 1964 as amended, establishes a substantive right which the Congress, under the Constitution, had a right to do. It is incongruous that the Congress would establish a substantive right, invite the penurious complainants into the courts, and then intend for them to be saddled with large ungainly debt for costs in the event that they are unable to establish, to the court's satisfaction, that in fact, the complainant was discriminated against in employment. We suggest that it was not the intent of Congress to expose people to the possibility of

bankruptcy in enacting this legislation. We further suggest that it was not the intention of Congress to grant this Court or any district court the authority to in any manner modify any substantive right determined by the Congress. In 28 U.S.C. § 2072, the Congress, in authorizing this Court to promulgate Rules of Civil Procedure, specifically provides that "such rules shall not abridge, enlarge or modify any substantive right. . . ." The Rules of Civil Procedure are, rules for the court to carry on its business in an orderly fashion, in effect, housekeeping rules. No authority was intended or granted for the Rules of this Court to be applied to substantive legislation to destroy the effect of the substantive rights granted by Congress. This Court in *Hanna v. Plumer*, 380 U.S. 460, 464, 85 S.Ct. 1136, 1140 (1965), quoted from *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14, 61 S.Ct. 422, 426 (1941), when it was asked to determine whether a federal rule applied.

> The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.

This Court has recognized, more than once, the substantive rights provided for in Title VII of the Civil Rights Act of 1964 as amended. We suggest that the case at bar demonstrates the real possibility of Rule 68 placing such a burden on the decision to seek redress for employment discrimination, that the rule would discourage actions which Congress has determined should be encouraged. This is a burden, on the substantive right, of such magnitude as to abridge or modify the right, which the Congress has specifically prohibited. We suggest that this Court's determination should be that Rule 68 may not constitutionally be applied to Title VII litigation.

II.

DEFENDANT'S OFFER OF JUDGMENT UNDER RULE 68 DID NOT MEET PLAINTIFF'S DEMAND FOR RELIEF.

Amicus have argued that Rule 68 does not apply to Title VII cases. However, if this Court should determine that it does, defendant has not met the requirements of the Rule with its offer of judgment of "$450.00 which shall include attorney's fees, together with costs accrued to this date." (Jt. App. pp. 33-34). Plaintiff in her complaint sought reinstatement, back pay, benefits, other equitable relief, and attorneys fees and costs all pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The offer and the prayer do not meet.

The relief contemplated in Title VII is of an equitable nature. As stated by this Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372 (1975) in discussing whether the court could award back pay.

> It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to "secur[e] complete justice." (citations omitted). . . . Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965).

Defendant's offer of judgment makes not the slightest attempt to meet the demand for equitable relief outlined in plaintiff's prayer. It merely addresses a damage award and attorney fees and costs. It does not address

reinstatement, back pay, benefits or injunctive relief of any sort. For an offer of judgment to be sufficient to trigger the application of Rule 68, it must reasonably encompass the relief prayed for. 7 Moore's Federal Practice, § 68.04 pp. 68-69 (1975).

Case law on Rule 68 is sparse. In *Scheriff v. Beck*, 452 F.Supp. 1254 (Colo. 1978), a civil rights case arising under 42 U.S.C. §§ 1983 and 1988, defendant made an offer of judgment excluding attorney fees. The district court held the offer did not satisfy Rule 68 because it did not include "costs then accrued" which in civil rights cases includes attorneys fees. In *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607 (E.D.N.Y. 1974) a patent infringement case, the offer was $25.00 and notice that defendant would cease the alleged infringement. The court held that that offer was valid. Neither case, nor others, definitively set out what sort of offer satisfies Rule 68.

The language in Rule 68 states that the offer must be to "allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued." For a plaintiff to understand the offer and to be clear that defendant is addressing all relief claimed by plaintiff, especially in a Title VII case where relief is not confined, the defendant must address all possibilities with specificity. Here defendant mentions money only and costs and attorney fees. Does this money include a possible back pay award? Nowhere does defendant mention the other benefits which were attendant to plaintiff's employment. Nowhere does defendant mention reinstatement. Nowhere does defendant mention that it would not discriminate in the future. The offer of judgment is in the nature of an offer

to settle the litigation and all relief aspects should be expressly included or excluded so that plaintiff knows what he is refusing. The apparently discretionless consequences under Rule 68 mandates that the offer of judgment be precise and complete.

CONCLUSION

This Court should determine that Rule 68 does not apply to Title VII as to do so would abridge substantive rights given under Title VII and would exceed the Court's authority to promulgate rules for uniform court procedure. In the alternative, the Court should find that defendant's offer does not meet plaintiff's demand for relief.

Respectfully submitted,

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APPENDIX

ROSEMARY AUGUST, hereby consents to the National Association for the Advancement of Colored People filing an Amicus brief on behalf of Rosemary August in the matter entitled:

Delta Airlines, Inc.

vs.

Rosemary August
No. 79-814
United States Supreme Court

ROSEMARY AUGUST

BY /s/ SUSAN MARGARET VANCE

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28 July 1980

Aldus S. Mitchell, Esq.
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134 South LaSalle Street
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Re: Delta Air Lines, Inc. v. August
No. 79-814

Dear Mr. Mitchell:

Thank you for your letter of July 22, 1980 to Allan Kovar.

The Petitioner, Delta Air Lines has no objection to your filing of a brief in the above-captioned matter as an amicus curiae, pursuant to the Rules of the Supreme Court.

Very truly yours,

/s/ BURR E. ANDERSON

BEA:ef